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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RUBEN CHAVEZ RADILLO, Defendant and Appellant.	G052128 (Super. Ct. No. BLF1100275) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Richard A. Erwood, Judge. Affirmed.

Laurel M. Nelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., Marilyn L. George, and Raquel M. Gonzalez, Deputy Attorneys General, for Plaintiff and Respondent.

Ruben Chavez Radillo appeals from a judgment after a jury convicted him of unlawful possession of heroin and/or marijuana while in prison, simple possession of heroin, and simple possession of marijuana. Radillo argues the following: (1) the trial court erred by admitting improper character evidence; (2) the court erred in instructing the jury; and (3) the prosecutor improperly questioned him on his right to remain silent. None of his contentions have merit, and we affirm the judgment.

FACTS

Radillo was an inmate at Chuckawalla Valley State Prison (CVSP) serving life. One morning, Correctional Officer Phillip Johnson searched Radillo. Johnson found a bindle hidden in Radillo's underwear. Johnson asked Radillo what was in the bindle, and Radillo replied, "'You'll see when you open it.'" Johnson told Radillo to bend over and cough. Radillo bent over and reached back with his hand, retrieved something from between his buttocks, and brought his hands together in front of him. Johnson heard a "snap" sound. Radillo put his hands behind his back. He was holding a piece of a flip cell phone in each hand. Johnson handcuffed him.

Johnson discovered heroin and marijuana inside the bindle. The bindle contained seven smaller bindles of heroin—one weighed about 1.0 gram, and the other six combined weighed about 2.6 grams. The value of the heroin in prison was about $3,000. The larger bindle also contained a bindle of marijuana weighing about 7.3 grams. The marijuana could yield 73 cigarettes and had a value in prison of about $730. Subsequent forensic testing revealed there was 0.39 grams of heroin (with the packaging), and 0.34 grams of marijuana (without the packaging).

An amended information charged Radillo with the following: unlawful possession of heroin and/or marijuana while in prison (Pen. Code, § 4573.6) (count 1); unlawful possession for sale of a controlled substance, heroin (Health & Saf. Code, § 11351) (count 2); and unlawful possession of marijuana for sale (Health & Saf. Code, § 11359) (count 3). The information alleged Radillo suffered two prior strike convictions

(Pen. Code, §§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)), and one prior prison term (§ 667.5, subd. (b)).

Before trial, the prosecution moved to admit evidence pursuant to Evidence Code section 1101. The prosecution sought to admit evidence Radillo previously suffered a conviction for violating Penal Code section 4573.6 when he possessed methamphetamine and marijuana while in prison. The prosecution argued this evidence was relevant to prove his knowledge, intent, and absence of mistake or accident and it was not unduly prejudicial. Radillo opposed the motion, contending there was not sufficient similarity between the prior offenses and the current charges and the evidence was unduly prejudicial. At the hearing on the motion, after counsel argued, the trial court ruled the evidence was admissible to demonstrate knowledge, intent, and absence of mistake or accident.

At trial, Johnson, who worked in the investigative services unit, testified an inmate using narcotics would usually possess a small amount, one or two bindles. He stated a bindle of heroin costs about $50 and usually contains a small amount, about .060 gram of heroin, described as a "hit." He added a "pinner" of marijuana is about .10 gram and is a toothpick-size marijuana cigarette. Johnson explained an inmate who has 6, 10, or 20 bindles possesses them for sale because an inmate who possessed for personal use could buy a larger bindle for less money. Johnson testified inmates who sell drugs have cell phones to conduct their drug business. He stated an inmate drug user could eliminate his drug debts by assaulting another inmate upon the drug dealer's request. Johnson testified prison could be a violent place, prisoners have their own rules, there are inmates who enforce those rules, and an inmate who owes a debt could be assaulted if he refuses to hold drugs for a drug dealer. He added an inmate who does not owe a debt could refuse to hold drugs for a drug dealer and ask to be moved.

The prosecution offered testimony that five years before the charged offense Radillo was an inmate in Avenal Prison. A correctional officer saw Radillo hand a beanie cap to another inmate. The beanie cap was filled with what appeared to be tobacco. Another correctional officer searched Radillo and found a lighter and an address book. Inside the address book there were seven individual bindles that contained a white powdery substance, a brown cigar with a green leafy substance wrapped in cellophane, and two cigarettes that contained a green leafy substance. On the prosecution's motion, the trial court took judicial notice of and moved into evidence a September 2005 complaint charging Radillo with violating Penal Code section 4573.6 for possession of methamphetamine and marijuana while in prison.

Radillo testified. Radillo admitted he was convicted of robbery in 1992, kidnapping for ransom in 1996, and possession of marijuana and methamphetamine while in prison in 2006. Radillo admitted he sold drugs outside prison and smoked marijuana in prison to alleviate pain from a tumor. He explained that upon entering prison, the inmates orient the person to the rules, one of which is to follow inmate orders and do not ask questions or you will suffer assaults. He added that the guards cannot protect an inmate from other inmates.

Radillo stated someone gave him the bindle a couple days before Johnson searched him and he took the bindle out of fear. He knew the bindle was contraband but he did not know it was drugs. Radillo admitted no one directly threatened him if he refused to hold the bindle but the unspoken consequence of refusing was to be assaulted. When asked whether it was possible to report to guards that he had been asked to hold drugs and request to be moved to the special needs yard, Radillo stated the special needs yard was worse than general population because there are more rules and inmates find out from others why the inmate was moved.

On cross-examination, when the prosecutor questioned Radillo about the circumstances in which he came to hold the contraband, he explained he sewed a pocket in his boxers "and [he] told them [he] was ready to hold it." The prosecutor questioned Radillo concerning his claim he had no choice but to hold the bindle and the following colloquy occurred:

"[Prosecutor]: Now, this happened in 2010, so it's been over three years since this happened, correct?

"[Radillo]: Yes.

"[Prosecutor]: And since this time you have not told one person that you were forced to hold a bindle, correct?

"[Defense counsel]: Objection. Improper question.

"[Trial court]: Overruled.

"[Radillo]: Have I told anybody?

"[Prosecutor]: Correct.

"[Radillo]: No.

"[Prosecutor]: So since December 18, 2010[,] you have not told one person that you were -- you were told to hold something?

"[Defense counsel]: Objection. Same argument. Improper questions. [*Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*)] [e]rror.

"[Trial court]: Overruled.

"[Radillo]: Can you repeat the question, please?

"[Prosecutor]: Is today the first day or have you told someone before this day about you being forced to hold that contraband?

"[Radillo]: I told my -- my attorney."

At a break, defense counsel moved for a mistrial asserting there was *Doyle* error. Although the trial court opined the prosecutor's last question was error, the court denied Radillo's mistrial motion and refused to admonish the jury so as to not highlight the answer.

As relevant here, the trial court instructed the jury on the charged and lesser included offenses, the prosecutor's burden of proof, and reasonable doubt. Additionally, the court instructed the jury on the proper use of Radillo's prior conviction, including that it could be used only to prove intent, knowledge, and mistake or accident. Finally, after much discussion as to whether there was sufficient evidence of duress, including whether the instruction included great bodily injury in addition to imminent death, the court agreed to instruct the jury with the pattern CALCRIM No. 3402.

The jury convicted Radillo of count 1. The jury acquitted Radillo of count 2 but convicted him of the lesser included offense of simple possession of heroin. The jury acquitted Radillo of count 3 but convicted him of the lesser included offense of simple possession of marijuana. At a bifurcated bench trial, the trial court found true Radillo suffered two prior strike convictions and one prior prison term.

The trial court sentenced Radillo to eight years on count 1 and one year on the prior prison term enhancement. The court imposed and stayed the sentences on counts 2 and 3 pursuant to Penal Code section 654. The court also sentenced Radillo on another case not relevant to our discussion here.

DISCUSSION

I. Evidence Code section 1101

Radillo argues the trial court erred by admitting the September 2005 evidence because it was not sufficiently similar and it was unduly prejudicial. We disagree.

"The rules governing the admissibility of evidence under Evidence Code section 1101[, subdivision] (b)[,] are well settled. Evidence of defendant's commission of other crimes, civil wrongs or bad acts is not admissible to show bad character or predisposition to criminality, but may be admitted to prove some material fact at issue such as motive, opportunity, *intent*, preparation, plan, *knowledge*, identity, *absence of mistake or accident*. [Citations.] Because evidence of a defendant's commission of other crimes, wrongs, or bad acts '"may be highly inflammatory, its admissibility should be scrutinized with great care."' [Citation.]" (*People v. Cage* (2015) 62 Cal.4th 256, 273, italics added (*Cage*).)

"To be admissible, there must be some degree of similarity between the charged crime and the other crime, but the degree of similarity depends on the purpose for which the evidence was presented. The least degree of similarity is needed when, as here, the evidence is offered to prove intent. [Citation.]" (*People v. Jones* (2011) 51 Cal.4th 346, 371.) Intent, knowledge, and absence of mistake or accident are closely intertwined. (See *People v. Hendrix* (2013) 214 Cal.App.4th 216, 242-243 (*Hendrix*).) "We review the trial court's ruling for an abuse of discretion. [Citations.]" (*Cage, supra*, 62 Cal.4th at p. 274.)

Here, the trial court did not abuse its discretion by admitting evidence of Radillo's 2005 drug offenses pursuant to Evidence Code sections 1101, subdivision (b), and 352. Evidence of the 2005 offenses for possession of methamphetamine and marijuana were relevant to establish Radillo's intent, knowledge, and mistake/accident. Radillo pleaded not guilty to the charged offenses (unlawful possession of a controlled substance while in prison and unlawful possession for sale of controlled substances), and thus all elements of the crimes, including his knowledge and intent, were at issue. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 407 (*Bryant, Smith and Wheeler*).) And as we explain above, absence of mistake or accident are closely related to knowledge and intent. Although the 2005 offenses involved methamphetamine and

marijuana (*Hendrix, supra,* 214 Cal.App.4th at p. 241 [evidence prior drug convictions relevant where controlled substance same]), and the charged offenses involved heroin and marijuana, each involved unlawful possession of illegal substances (*People v. Williams* (2009) 170 Cal.App.4th 587, 607-608 [prior offenses cocaine and marijuana and charged offense methamphetamine]). Thus, the court did not abuse its discretion because the evidence was relevant to establish facts other than Radillo's propensity to commit drug offenses. (*Bryant, Smith and Wheeler, supra,* 60 Cal.4th at p. 409.)

The trial court also did not abuse its discretion pursuant to Evidence Code section 352. Evidence of the 2005 offenses would not evoke an emotional bias against Radillo. (*Cage, supra,* 62 Cal.4th at p. 275.) The 2005 offenses involved unlawful possession of illegal substances similar to the charged offenses and would not cause the jury to prejudge the case against Radillo. Presentation of the 2005 offenses did not consume an undue amount of time, consisting of merely 17 pages of the roughly 375 pages of reporter's transcript. Finally, admission of the 2005 offenses would not confuse or mislead the jury. The trial court instructed the jury with CALCRIM No. 375, regarding the jury's use of the prior evidence. That instruction told the jury it could not rely on this evidence alone to convict Radillo of the charged offenses and that it could consider the evidence only on the issue of knowledge, intent, and absence of mistake or accident. Therefore, the court did not abuse its discretion by admitting evidence of the 2005 offenses.

In any event, any error was harmless because there is no reasonable probability Radillo would have received a more favorable result had the trial court not admitted the 2005 evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Radillo testified he knew he was holding contraband but claimed he did not know what he was holding. Radillo was holding about 43 doses of heroin and 73 marijuana cigarettes. Based on his statement, and the fact he could hide it in his underwear, the jury could

reasonably conclude Radillo knew he possessed drugs and not a weapon or some other contraband. Thus, Radillo was not prejudiced by admission of the 2005 evidence.

II. CALCRIM Nos. 3402 & 3403

Radillo contends the jury instructions were erroneous. First, he contends the court erred by failing to modify CALCRIM No. 3402 to ensure it was complete. Second, he asserts the court erred by failing to instruct the jury sua sponte with CALCRIM No. 3403. Neither contention has merit.

The trial court instructed the jury with CALCRIM No. 3402 as follows: "The defendant is not guilty of the crimes charged if he acted under duress. The defendant acted under duress if, because of threat or menace, he believed that his life would be in immediate danger if he refused a demand or request to commit the crimes. The demand or request may have been express or implied. [¶] The defendant's belief that his life was in immediate danger must have been reasonable. When deciding whether the defendant's belief was reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in the same position as the defendant would have believed. [¶] A threat of future harm is not sufficient; the danger to life must have been immediate. [¶] The People must prove beyond a reasonable doubt that the defendant did not act under duress. If the People have not met this burden, you must find the defendant not guilty of the crimes charged."

Radillo contends the trial court erred by failing to modify CALCRIM No. 3402 "to acknowledge that threats of great bodily injury as well as threats of immediate death could establish the requisite defense." "'[A] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested an appropriate clarifying or amplifying language.'" (*People v. Mejia* (2012) 211 Cal.App.4th 586, 617.) Here, it is true that at the hearing on the jury instructions, defense counsel argued there was authority to support modifying the instruction to include the language "great bodily injury or death." But

later when the trial court agreed to instruct the jury with CALCRIM No. 3402, defense counsel did not request the instruction be modified to include this language. In any event, the record contains no evidence Radillo faced *imminent* death or great bodily harm. At trial, Radillo conceded no one expressly threatened him and after he sewed a pocket in his boxers he told "them" he was ready to hold the contraband. We agree with the Attorney General "the trial court made a broad—and generous—interpretation" of the evidence supporting giving this instruction. The court did not err.

Radillo argues the trial court had a sua sponte duty to instruct the jury with CALCRIM No. 3403. CALCRIM No. 3403 states as follows: "The defendant is not guilty of <*insert crime[s]*> if (he/she) acted because of legal necessity. [¶] In order to establish this defense, the defendant must prove that: [¶] 1. (He/She) acted in an emergency to prevent a significant bodily harm or evil to (himself/herself/ [or] someone else); [¶] 2. (He/She) had no adequate legal alternative; [¶] 3. The defendant's acts did not create a greater danger than the one avoided; [¶] 4. When the defendant acted, (he/she) actually believed that the act was necessary to prevent the threatened harm or evil; [¶] 5. A reasonable person would also have believed that the act was necessary under the circumstances; [¶] AND [¶] 6. The defendant did not substantially contribute to the emergency. [¶] The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each of the six listed items is true."

It is true a trial court has a sua sponte duty to give defense instructions supported by substantial evidence and consistent with the defendant's theory of the case. (*People v. Barton* (1995) 12 Cal.4th 186, 194-195.) Here, however, there was no evidence supporting giving CALCRIM No. 3403. Again, as we explain above, there was no evidence supporting the first element of the instruction—that Radillo agreed to hold

the bindle of drugs in an emergency to avoid significant bodily harm or evil. Therefore, the trial court did not err by failing to modify CALCRIM No. 3402 or failing to give CALCRIM No. 3403.

III. Doyle

Radillo asserts the prosecutor committed *Doyl*e error when during cross-examination she asked him whether he had told anyone that someone forced him to hold the bindle. The Attorney General responds *Doyle* was not implicated because the record does not establish Radillo was advised of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). We agree with the Attorney General.

Doyle, supra, 426 U.S. at page 619, held it is fundamentally unfair for the prosecution to use the accused's pretrial silence following *Miranda* warnings to impeach an explanation subsequently offered at trial. As the Supreme Court explained, "*Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him. [Citations.] *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances." (*Anderson v. Charles* (1980) 447 U.S. 404, 407-408.) Conversely, when no *Miranda* warnings are given, it does not violate due process "for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." (*Fletcher v. Weir* (1982) 455 U.S. 603, 607; *Jenkins v. Anderson* (1980) 447 U.S. 231, 238-239 [no due process violation occurs when prosecutor comments on defendant's prearrest and pre-*Miranda* silence].) Thus, *Doyle* applies only when *Miranda* warnings have been given to the defendant. (*People v. Delgado* (1992) 10 Cal.App.4th 1837, 1841.)

Here, in his reply brief, Radillo acknowledges the limits of the *Doyle* court's holding. Radillo does not dispute the Attorney General's assertion the record is silent on the issue of whether he was advised of his *Miranda* rights. Instead, Radillo

"urges this [c]ourt to find the right to remain silent extends to circumstances other than custodial interrogation." We decline his request.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

THOMPSON, J.